

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

REPLY BRIEF OF THE
ASSOCIATION OF
ALTERNATE POSTAL SYSTEMS

Notwithstanding the uniformed and, regrettably, incorrect claim of MOAA, DMA and PostCom (Brief at 25) speculating that AAPS has substantial resources to devote to this case (how could it when its membership is declining precipitously (Tr. 19146)¹ and its remaining members are struggling financially²), AAPS cannot sit by silently, as it had intended, and allow the misrepresentations in the briefs of saturation mailers to go unanswered. We will therefore file this very limited reply brief that hits only the most egregious of the potential targets.

Speaking of resources, MOAA has *two* briefs on the same subject, its own and that it shares with DMA and PostCom. We will start with the solo effort, in which it, like its allies, denies the existence of competitive harm by redefining the competitive market

¹ But not as precipitously as AISOP seems to think. At page 18, it dismisses the significance of alternate delivery, because, AISOP says, alternate delivery reaches only 2-3% of U.S. households, citing Tr. 10035. If AISOP knew anything about the alternate delivery business, or even if it had bothered to read the rest of White's examination, it would have learned that he misspoke during the cited cross-examination and expressly stated (Tr. 10088) that if he had referred to households, he was unaware of it. Rather, his 2-3% estimate was volume, that is 2-3% of the potential market (Tr. 10088-90). Had AISOP looked at AAPS-LR-1, the AAPS membership directory that lists unduplicated households served by each member, it would also have known that its assertion is preposterous, as is the dependent contention (Brief at 19-20) that "independent" alternate delivery companies serve a "minuscule" geographic portion of the nation.

² See SAI report. . . . We almost forgot. We can't cite the SAI report, even to the extent that it refers to our industry, not the Postal Service, because the Postal Service won't allow it, and those that in their briefs criticize us for not presenting survey data we cannot come close to affording stood on the sidelines, rather than joining us in our efforts to obtain the information that they sanctimoniously profess they desire.

to suit its purposes. Thus, MOAA (Brief at 21) bemoans the fact that AAPS (and NAA) can participate in PRC proceedings, seek discovery responses from the Postal Service, “require the Service to justify its proposals in the minutest [sic] detail” and “set their prices at will and keep those prices secret.” Even worse, we can “offer volume discounts and adjust...pricing strategy....” Apart from the fact that AAPS cannot “require” the Postal Service to do anything,³ we plead guilty to all of these crimes, but nothing in this list of horrors distinguishes AAPS from MOAA and its members, DMA and its members and PostCom and its members, including its biggest.

What MOAA is really saying is that mailers don’t like having one of their largest, if not their largest, costs set by someone else, the Postal Rate Commission, in a public setting. In other words, they do not have direct control over their delivery costs, as if anyone in the delivery business does. Alternate delivery companies, like newspapers and like mailers, have costs over which they have no direct control.

Turning next to the collective efforts of MOAA, DMA and PostCom, AAPS takes issue with the assertion (Brief at 4) that “[t]he record shows” that Postal Service competitors such as AAPS members “have enjoyed robust volume growth.” Ironically, this undocumented claim (if the record shows it, why not provide a citation) is followed immediately by the statement that the Commission should not rely upon “unsubstantiated claims.” Unless, we suppose, they are made by MOAA, et al.

³ Recall several cases ago when AAPS obtained an order first from the Presiding Officer and then from the full Commission seeking information about an internal USPS memo insisting that Advo’s mail be delivered on the days requested by Advo, but the Postal Service simply refused to comply.

Equally undocumented, although a few unpersuasive citations are provided, is the assertion (Brief at 18) that the “excessive” pound rate has had an adverse impact on testifying mailers’ businesses. That’s not how we read the record, in which mailer Baro appeared to have no problem with the present rates, testifying that it is important to “maintain” reasonable ECR rates and that he depends upon the Postal Service for “keeping saturation rates affordable” (Tr. 14376). Smith stated that today’s saturation rates are reasonable (Tr. 14546), as did Merriman, who claimed that the saturation rates for the past five years have been “reasonable” and that, as a result, both his advertisers and readers have benefited (Tr. 15661). Far from claiming that today’s rates have a significant negative affect, as MOAA et al. assert, he added that today’s rates “have been beneficial to my business” (Tr. 15562) and that if rates were to remain stable, that benefit would continue.

MOAA et al. also are well wide of the mark in asking the Commission to invoke the adverse inference rule and declare that no harm will befall the alternate delivery industry because we allegedly provided “no testimony” about our rates (Brief at 24-25). Apart from the fact that the factual premise is wrong,⁴ the conclusion does not follow. As we hope we showed in our initial brief, the specific prices of individual alternate delivery companies are not significant to an analysis of the state of competition or the impact on competitors. If they were, and if our opponents are right that alternate delivery costs less, then we would have all or at least a great deal more of the business.

⁴ Unlike Advo, witness White offered his company’s rate card (Tr. 9980-82), provided his range of rates for shoppers (Tr. 9974) and offered specific prices for specific types of delivery (Tr. 10015). In light of this

Instead, the prices charged by alternate delivery companies are merely one of the factors that mailers weigh in choosing a form of delivery, and it is therefore tautological that if postal prices decline, competitors will be injured. Knowing the price charged by every alternate delivery company in the country will not change that equation. And knowing those prices will not help the Commission, because it has not been presented with the prices charged by mailing companies, like Advo, that represent alternatives for advertisers who might choose alternate delivery.⁵ Thus, if the Commission wishes to invoke the adverse inference rule because the alternate delivery price information we did provide was inadequate, it could reject any claim that our prices are higher than those of our competitors like Advo. The only problem is that we do not make that claim. It could not find on the basis of any rule, or the record, that a decline in the pound rate will not cause the harm we have shown would occur.

Finally, MOAA et al. (Brief at 32-33), joined by Advo (oops, we mean the Saturation Mail Coalition)⁶ (Brief at 53-56), resurrect their triennial, now becoming biennial, argument that it doesn't really matter if alternate delivery companies will be driven out of business by a reduced pound rate, because it is "competition," not "competitors," that are the object of protection in section 3622(b)(4). The basis for this

information, we do not know what motivated MOAA et al. to assert (Brief at 31) that we have "failed to provide any data about how they price their products. . . ."

⁵ It is silly for Advo to argue, as it does at page 43, note 24, that it offered pricing information for the record, but that AAPS and NAA simply refused to ask the right questions. Mr. Giuliano's willingness to offer some form of information at a time in the hearing when there was no discovery or even time to prepare for cross-examination was gratuitous, and the Presiding Officer properly refused to permit this gambit. Had Advo wished its pricing in the record, it had two legitimate chances to do so at times and in a manner that would not have deprived other parties of their due process rights. We eagerly await Advo's direct testimony in Docket No. R2002-1 for a full revelation of its prices in its major markets.

⁶ Even Advo gets confused. At page 43 of "its" brief, footnote 24, it refers to Vincent Giuliano as "Advo witness Giuliano," when in fact his testimony clearly states (Tr. 18985) that he appeared on behalf of SMC.

attempt to read the words “enterprises in the private sector” out of the Act is the court’s decision in *Direct Marketing Ass’n Inc. v. USPS*, 778 F. 2d 96 (1985).

The Second Circuit’s decision is not that broad, and could not be in light of the clear legislative language. The “competitor” versus “competition” distinction has its genesis in *Brown Shoe Company v. United States*, 370 U.S. 294 (1962). There, the court was dealing with section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that substantially “lessen competition. . . .” Accordingly, the Court’s analysis was concerned with the effect on “competition,” not the particular “competitor” being acquired. The later case of *Brunswick Corp. v. Bowl-O-Mat*, 429 U.S. 477 (1977), upon which the Second Circuit relied in *Direct Marketing*, similarly involved Section 7 of the Clayton Act.

Needless to say, the Postal Reorganization Act is not the Clayton Act, and the specific reference to enterprises in the private sector is not a reference to “competition.” Thus, the court decisions read in a manner consistent with the Commission’s statutory obligations means that the Commission must not focus exclusively on a particular competitor but must examine the impact of competing enterprises in the private sector in a more general sense to determine the impact on competition. If, as is the case here, the rate reduction sought by the Postal Service and its beneficiaries is such that it will damage competitors on a broad scale, it will *a fortiori* adversely affect competition as well.

MOAA et al. probably understand that harm to competitors from a rate reduction should be taken seriously by the Commission and weighed along with other factors, for there is no other way to explain the absurd contention (Brief at 34) that “the Postal

Service is not even proposing to reduce rates.” Rather, they contend, the rates “for the Standard A subclasses are increased under this proposal.” AAPS members are certainly relieved, because we thought—and the Postal Service agrees—that the rates charged to Saturation ECR pieces weighing five ounces or more would in fact be reduced under the proposal. (Tr. 9946). It is obviously of no consequence if the rates applicable to mail for which there is no competition are raised to offset reductions applicable to mail for which there is competition.

This final section will deal with the brief of Advo/Saturation Mail Coalition. It, like MOAA, makes the undocumented, unsupported and unsupportable claim (Brief at 7) that saturation private delivery of retail preprints is “growing.” How we wish that Advo and the other members of SMC had joined with us to pry loose the SAI-gathered data. Then the Commission and the parties could rely upon the best information available, rather than claims that are supported at best by the experience of one company in a couple of markets.

Our final reply is to Advo/SMC 's mischaracterization of the nature of the competition at issue in this case. It contends (Brief at 57-49) that for shoppers and shared mail programs that are delivered privately, the real competition is with the Postal Service's solo saturation postage rate, because these shoppers and shared mail programs would not choose to be placed inside another shopper or shared mail set that is being mailed. Everything after “because” is true but irrelevant. The concern of those in the alternate delivery business that depend upon saturation delivery of shoppers or shared mail sets , and that is most of them, is not just that they will move, lock, stock and barrel, to the mail. Instead, it is that the preprints upon which the success of these

ventures depends will opt to move *from* that shopper or shared mail set *to* a mailed shopper or shared mail set. With that movement, the viability of the shopper or set is threatened, as is the alternate delivery company itself. So it is the (undisclosed) price charged by mailers like Advo that presents the competition, and Advo/SMC's efforts to demonstrate to the contrary should be ignored.

Advo/SMC attempt to minimize this threat and the entire testimony of AAPS witness White by claiming (Brief at 46), falsely, that he knew little about the saturation part of the business, because his company "focuses on non-saturation (or selective) distribution" of a TMC product. First, Mr. White is the executive director of AAPS, so he knows a great deal about the saturation business, but he also knows it *because he is in it*. Contrary to Advo/SMC's claim, Mr. White's alternate delivery company, DSO, delivers millions of saturation, non-TMC pieces per year. See Tr. 9972, which shows that it delivers 210,000 TMC pieces weekly, and Tr. 10029, where Mr. White stated (under cross-examination from Advo/SMC's counsel) that DSO delivers a total of about 300,000 pieces a week. The difference of 90,000 per week totals nearly five million pieces annually that would qualify as Standard saturation pieces. If that point escaped Advo/SMC, the following exchange (Tr. 10039-40) with their counsel should not have:

Q Now when you say saturation deliveries, is that distinct from the weeks where all you deliver is to non-subscribers?

A Yes. There's hardly a week goes by when we don't do some type of saturation delivery in some portions of the city. Obviously if we do 300,000 we have to when there is only 210,000 [TMC] on average.

This exchange followed Mr White's estimate that 40% of his volume *is not the TMC product* (Tr. 10039), yet Advo/SMC cites this page for the clearly erroneous proposition

that DSO focuses on non-saturation delivery "with some distributions to subscriber households on an irregular basis." (Brief at 46.)⁷

These and other ineffectual arguments should not persuade the Commission to lower the pound rate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following document upon all participants in this proceeding in accordance with section 12 of the Rules of Practice.

Bonnie S. Blair

Bonnie S. Blair

⁷ An equally myopic examination of the record produced the claim (Br. at 50, n. 27) that Mr. White's assertion that alternate delivery has been driven out of the lightweight market is "ludicrous." From the second part of the response at Tr. 9986, it is clear that the witness was referring to the kind of revenue producing light weight pieces that accompanied the magazines he delivered, not those inside the TMC package.